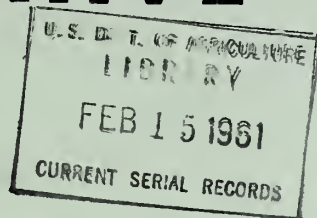


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SUMMARY of COOPERATIVE CASES



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UNITED STATES DEPARTMENT OF AGRICULTURE
FARMER COOPERATIVE SERVICE

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The comments on cases reviewed herein represent the
personal opinion of the author, and not necessarily
the official views of the Department of Agriculture.

PATRONAGE REFUNDS - NON-CASH DISTRIBUTION - TIME WHEN TAXABLE

TO PATRONS UNDER OREGON LAWS

(James E. Kuhns and Faith W. Kuhns v. S. W. Horn, Samuel B. Stewart and Carl Chambers, Tax Commissioners, constituting the State Tax Commission of the State of Oregon. 355 P.2d 249 (Sept. 7, 1960)) (Bound Volume)

Following the rationale of the Federal court decisions in Long Poultry Farms, (Summary No. 3, p.23, Dec. 1957) and B. A. Carpenter, (Summary No. 63, p. 1, Mar. 1955) the Supreme Court of Oregon held, in this case, that patronage refunds credited on an agricultural cooperative's books to its patrons and for which "Capital Reserve Certificates" were issued that were non-interest bearing, redeemable at the option of the board, and subject to diminution by losses, were not currently taxable to patrons under the Oregon income tax statute. In so holding, it recognized, however, that the refunds would be taxable when redeemed. The court's decision overturned a regulation of the Oregon State Tax Commission which required these refunds to be reported by the farmer and taxed at their face amount in the year in which they were entered on the cooperative's books and evidence of that action was received by the taxpayer.

In 1952 and 1953 Kuhns was a member of the Weston Grain Growers, Inc., an agricultural cooperative association organized under ORS 62 which governed the organization and operation of co-operatives as business organizations. Kuhns was also a patron whose transactions with the cooperative entitled him to patronage benefits.

As a result of his transactions with the cooperative in 1952 and 1953, Kuhns was credited on the cooperative's books with certain patronage dividends evidence of which was received by him in each of the years in the form of a Capital Reserve Certificate.

The Commission construed the receipt of the quoted certificate in November 1952 and its counterpart in November 1953, as the receipt of taxable income during each tax year in the amounts shown on the respective certificates and assessed the income tax accordingly. Kuhns paid the tax and sued for a refund as provided by ORS 314.460, supra, (formerly ORS 316.665; § 110-610. OCLA).

The Commission contended that the circuit court erred in granting the refund. Kuhns, on the other hand, argued that the refund was not taxable until he had "received something he can spend." The trial court agreed with Kuhns and the Commission appealed. The trial court's decision was affirmed.

To determine the effect of the patronage certificate, the court reviewed the bylaws and articles of association of the cooperative, and found as follows:

"It is seen from the above provisions of the articles and by-laws that the holder of a patronage dividend certificate receives evidence of a debt owed by the association to the patron under several limiting contingencies.

"Nowhere in the articles of association or in the by-laws may be found a word that gives the holder of a certificate the right to exercise any dominion and control over what the Tax Commission says is 'his' money.

"He cannot pledge the certificate as collateral.

"He cannot sell it.

"He cannot even apply it to his seed or fertilizer bill with the association until after the directors, at some time in the future which may never come to pass, declare that the certificate is 'distributable'.

"Creditors, secured and unsecured, may precede the patron in any future year, and in a bad year they could seriously reduce or wipe out the reserves held by the association."

In its effort to overturn the circuit court's decision, the Commission advanced several theories, among which were these: (1) that the patron had made an anticipatory assignment of income; or (2) that "some kind of agency relation between the patron and the association is created by the nature of their transactions."

In disposing of these theories the Court said, in part:

"Kuhns had three choices when he harvested his wheat. He could sell it on the open market, or he could keep it, or he could sell it to the cooperative. When Kuhns took his wheat to the cooperative, presumably he

obtained the market price for the wheat. The record does not show the details of the sale or whether title to the wheat passed to the cooperative. But this fact is immaterial, as the articles of association clearly provide for both purchase and sale with all the legal consequences thereof. The cooperative thereafter sold the wheat at what later turned out to be a profit. The cooperative presumably put the money in its bank, and used it in its sole discretion. Later, when the wheat accounts had been reckoned, the cooperative advised Kuhns that he had a share of the association's reserve equal to \$175.33 (for the year 1952), payable to him at some future time, if all went well and if the directors should decide to make distribution.

"In the meantime, Kuhns received nothing which he could show as an asset on any financial statement. The dividend could draw no interest. Kuhns could not even set off the \$175.33 against his accounts payable to the cooperative, if any. He was financially in the same position with reference to his 1952 crop as if he had sold his wheat for cash to a stranger.

"It is quite true that Kuhns could carry in his pocket the evidence of a contingent asset, which would be worth as much to him as any other unsecured promissory obligation to be paid at the sole discretion of the maker. But we find no authority holding that contingent assets of this character are income.

"The theory of a continuing anticipatory assignment of future income, if logically pursued, would also entitle the taxpayer to take a tax loss in any year that the association dipped into its reserves because its operating expenses exceeded any profit made on the resale of wheat. The Commission does not contend that there can be anticipatory benefits from losses. We are not dealing with a partnership, but with a distinctly separate creature of the law. Cooperative associations are neither partnerships nor ordinary business corporations, and the Legislative Assembly has recognized their distinct character by enacting a special chapter of the Code to deal with them. ORS ch. 62

"There is no need to indulge in the legal fiction of an anticipatory assignment, because in reality Kuhns had nothing to assign. He merely sold his wheat.

Having sold to a cooperative, a legal relationship peculiar to such organizations came into being. The nature of the relationship was primarily that of seller (Kuhns) and purchaser (the association), with other rights and duties spelled out by the articles of association, the by-laws, and relevant statutes. . .

" The Commission [also] contends that the association was the agent of the patron for the purpose of receiving the patron's income and holding it for future distribution, citing Oregon Grower's etc. Assn. v. Lentz, 107 or 561, 580, 212 P.811. In the Lentz case, the contract between the grower and the cooperative required the Association to pay all proceeds, less a stipulated reserve, to the grower. The grower had a written agreement which spelled out in detail the duties each party owed the other.

"In the instant case, the association had a general duty to account, but there was no limitation upon its stewardship. It had unlimited discretion in the creation and maintenance of reserves. There can be no agency relationship unless the purported principal has some control over his purported agent. A business organization which operated in its sole and unlimited discretion is not an agent but a principal. ALI Re-statement 2d, Agency §§ 1, 14."

The court then discussed a number of anticipatory assignment of income cases, but found them inapplicable. It then turned to the Federal cases, and with this comment rejected the Commission's argument that they were not applicable:

"While it is true that the Federal decisions are not binding on the State of Oregon with reference to local taxes, such decisions are entitled to be considered for whatever instructive value they may have in a particular case."

The court concluded as follows:

"A final argument is made by the Commission in this case that to permit the taxpayer to postpone reporting the income until he receives the actual cash permits an escape of taxable income which is made possible by the nature of an Oregon cooperative association. Under ORS 317.080(9) agricultural cooperative associations are exempt from the

corporate excise tax if they meet certain prescribed conditions. The theory behind the exemption from corporate excise tax is that the State will receive its taxes when the patrons receive their income, hence there is no need to tax the organization. In this respect, the exempt cooperative association enjoys an advantage not shared by ordinary corporations, but which is similar to that available in the partnership method of doing business. This was a choice which the legislature saw fit to exercise. The cooperative is a distinct entity and its tax status is its own. The Commission seeks to impose liability on the patron because there was a profit and hence a taxable event. As far as the patron is concerned, the taxable event occurs when he receives income.

"The Commission says that some tax revenue may escape by reason of future losses by the association reducing past earnings or by a taxpayer receiving distribution of his patronage dividends in a year when his tax bracket is lower than it would have been if the income had been taxable during the year when it was entered on the association's books. The argument begs the question. The real question is whether the taxpayer can manipulate such a result. The answer is no; the matter is entirely out of his control.

"While it is true that some income may escape taxation altogether and that other income may eventually be taxed at a lower rate, it is equally possible that some income may be taxed at a higher rate. It is proper for taxpayers to minimize their taxes in every legal way. The fact that a taxpayer does business with a tax-exempt cooperative does not render him liable for taxes on profits over which he can exercise no control, until such time as the income becomes such to the taxpayer. If the Commission considers that there is a potential escape of taxation, and deems it a matter of concern, then that is a matter for legislative consideration. It is no answer for the Commission, by its own action, to designate something as income when it is not income. The power to substitute its own accounting method for that of the taxpayer does not extend to a power to call something income during a year when it is not income by any accounting method.

TRADE REGULATION - BROKERAGE OR COMMISSION PAYMENTS TO
A COOPERATIVE PURCHASING ORGANIZATION

(Kentucky Rural Electric Cooperative Corp. v. Moloney Electric Co. 282 F. 2d 481 (1960))

In this decision, the Sixth Circuit Court of Appeals affirmed a decision of the U.S. District Court for the Western District of Kentucky (175 F. Supp. 250) which held (1) that Kentucky Rural Electric Cooperative Corporation (hereinafter called KYRECC) had violated section 2(c) of the Clayton Act (15 U.S.C. 13(c)) by accepting certain commissions from Moloney Electric Company (hereinafter called Moloney) incident to orders which it placed with Moloney for electrical equipment ordered by the members of KYRECC; (2) that Moloney could set up this illegal conduct as a complete defense in an action by KYRECC against Moloney brought under other sections of the Robinson-Patman Act (15 U.S.C. 13, 13a, 15 and 22) to recover treble damages for an alleged unfair trade practice; and (3) that section 13b, 15 U.S.C., (which states that nothing in the Robinson-Patman Act "shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association") does not exempt a cooperative "in the acquisition of such profits in its business operations before they are distributed", the purpose of the section being merely to allow the cooperative to distribute its legally acquired trading margins among its members on a patronage basis, without such distributions technically being considered a discriminatory rebate or price discrimination under other sections of the Robinson-Patman Act.

The court's holding on point three is consistent with the decision of the second circuit in American Motor Specialties Co. v. Federal Trade Commission, 278 F. 2d. 225 (May 5, 1960) reported in Summary Legal Series No. 13, dated June 1960.

KYRECC is a rural electric cooperative corporation incorporated under the Kentucky statutes. It is not an operating rural electric cooperative and does not generate, transmit or distribute electric energy. It is a so-called "super-cooperative", owned and controlled by twenty-two operating cooperatives to "purchase materials, supplies and equipment for its members," the cooperatives.

Moloney manufactures electrical equipment and supplies.

Early in 1949 KYRECC began handling transformers and a few other items of equipment manufactured by Moloney, the arrangement being that KYRECC would take an order from a cooperative for Moloney equipment, send the order to Moloney in St. Louis; Moloney would bill the cooperative the ordinary price for the equipment and send KYRECC its commission on the sale. During the period between 1949 and October 15, 1955, KYRECC did not make any sale to any customer or purchaser other than the cooperatives.

In October 1955 Moloney notified KYRECC that it, Moloney, would no longer pay to KYRECC commission on such orders, and since that time refused to pay any commissions to the appellant.

KYRECC's complaint alleged that Moloney's refusal to accept further orders and its arbitrary termination of the previously existing arrangement had the effect of lessening competition between distributors and manufacturers' sales representatives of electrical equipment; that it tended to create a monopoly and destroy and prevent competition; and was unlawful discrimination in favor of certain distributors, suppliers, jobbers, and manufacturers' sales representatives in competition with KYRECC, which caused KYRECC to suffer damages in the amount of \$157,555.40.

Moloney contended that KYRECC was an agent and representative of, and was acting in fact for and in behalf of both the member cooperatives who were owners of KYRECC, and the participating cooperatives, and that the payment by Moloney to KYRECC and the acceptance by KYRECC from Moloney of anything of value as a commission upon the purchase through KYRECC was unlawful by reason of the provisions of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, Section 13(c) Title 15 U.S.C.A. which provides as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

The facts were not disputed and were established by the testimony of the executive manager of KYRECC, its articles, bylaws, and other exhibits. Moloney's motion for summary judgment was sustained by the District Judge from which ruling appeal was taken.

The court held that it would not adjudge liability against a defendant for refusing to do that which the Act makes it illegal for him to do, and that since the payment of commissions to appellant was illegal under the Act, the District Judge was correct in ruling that no cause of action arose in favor of appellant upon appellee's refusal to make the illegal payments. The court stated that as pointed out by the District Judge, the present action was not for breach of contract but for damages for violation of the anti-trust laws, and that Moloney had not refused to sell its equipment to the members and participating cooperatives, but had only declined to pay appellant a commission on such sales. The judgment was affirmed.

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OREGON EXCISE and INCOME TAX LAWS

APPLICABILITY OF EXEMPTION PROVISIONS TO FEDERATIONS OF FARMER COOPERATIVES

(Pacific Supply Cooperative v. Dean Ellis, et al.
Supreme Ct. State of Oregon, Nov. 10, 1960)

Appeal by Oregon State Tax Commission from a decree of the circuit court which held that the Pacific Supply Cooperative was exempt from corporation excise taxes under ORS 317.080(9).^{1/} Pacific sued for a refund of taxes paid and the commission filed a demurrer which was overruled. In affirming the circuit court's decision, the Court held that the above statute was intended to grant exemption to those farmers' cooperatives which chose to accept the burdens of the statute, and that such tax exemption extended to cooperatives which continue to meet the qualifications although their actual stock

^{1/} The circuit court's opinion was summarized in Legal Series No. 13, June 1960.

ownership is once removed from the individual farmer through a federation of cooperatives. The court stated that the controlling element is the method of doing business, not the ownership of stock, and that ORS 317.080(9) specifically provides that exemption is not denied because a cooperative has capital stock, provided the statutory qualifications are met.

Prior to the tax year ending June 30, 1954, Pacific had done business in Oregon since 1933 as an exempt corporation under tax laws administered by both state and federal authorities. Pacific is a cooperative corporation, the shares of which are owned by 122 local farmers' cooperatives in Oregon, Washington, and Idaho. About one half of the 70,000 farmers who are members of the constituent cooperatives of Pacific reside in Oregon. Pacific purchases petroleum, fertilizer, farm machinery and related products in large quantities for distribution to its member organizations, which in turn sell directly to individual farmers. Pacific qualified under § 521, Internal Revenue Code of 1954 and existing federal regulations as an exempt cooperative. Federal exemption was first granted October 4, 1935, and was reconfirmed in December, 1945, after an audit.

Exemption from the state tax was apparently taken for granted until 1958, when the commission notified Pacific of a proposed assessment for the four previous years.

The commission contended that Pacific Supply Cooperative was not a "producer" as that word is employed in the exemption statute, ORS 317.080(9) which states as follows:

"Farmers' and fruit growers' associations, organized and operated on a cooperative basis (a) for the purpose of marketing the products of members or other producers and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (b) for the purpose of purchasing supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the state of incorporation or eight percent per year, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially

all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or purchase their supplies and equipment through the association. Exemption shall not be denied any such association because there is accumulated and maintained by it a reserve required by state law or a reasonable reserve for any necessary purpose. Such an association may market the products of non-members in an amount the value of which does not exceed the value of the products marketed for members, and may purchase supplies and equipment for nonmembers in an amount the value of which does not exceed the value of the supplies and equipment purchased for members, provided the value of the purchase made for persons who are neither members nor producers does not exceed 15 percent of the value of all its purchases."

The Oregon exemption statute contains practically the same wording as § 521 of the Federal Internal Revenue Code and the decision stated that it was the custom of the court to adopt the interpretation given a Federal act by the Federal courts where an Oregon statute had been copied from the Federal act. It was observed that in State and Federal jurisprudence provisions granting tax exemptions are to be strictly construed. However, the court stated that the question is not whether to follow strict construction or liberal construction, but whether an express legislative intent to confer a tax exemption upon farmers is to be limited to benefit those farmers who organize one and only one qualified cooperative. The court's opinion noted that operating under the rule of strict construction of exemption provisions, the Internal Revenue Service has construed the Federal act in favor of federated cooperatives such as the Pacific Supply Company since the first enactment of the cooperative exemption.

In concluding that the Pacific Supply Cooperative was exempt from corporation excise taxes the court stated in part as follows:

" In all of the federal decisions involving cooperatives owned by associations of growers in which exemption has been allowed, a controlling fact is that all the profits earned by the federated cooperative are fed down to the individual-producer members of the constituent cooperatives in the form of patronage dividends. This procedure is conceded to exist in the case at bar.

"A true cooperative makes no profit. The marketing cooperatives' method of doing business is intended to realize for the producer-members the highest return for their agricultural efforts. In a purchasing cooperative the farmer-members realize a saving in the purchase of supplies, and thereby reduce their costs. Many cooperatives engage in both marketing and purchasing. It is obvious that, by association, two or more farmers' cooperatives can increase their bargaining power and thereby increase the direct benefits to their individual members. The policy of the exemption from income tax is a legislative effort to assist the farmer in realizing the maximum income. The income is then taxed once, in the farmer's hands.

"While the pleadings do not document the proposition, there is general agreement among the authorities that federated marketing and purchasing associations have been an outgrowth of centralization in marketing and distribution elsewhere in the economy. It is reasonable to infer that a small cooperative consisting of a handful of farmers would be unable to realize significant savings in the purchase of supplies. When combined with other cooperatives in a federated organization, bargaining power is substantially increased. See Packel, Law of Cooperatives (3d ed) 27, § 5 (a).

"If it is the legislative policy to encourage farmers to combine their bargaining power through cooperatives engaged in buying and in selling, all of the policy reasons which favor tax exemption for the farmer-owned cooperative apply equally in favor of tax exemption for the farmer-owned-cooperative-owned cooperative. Whether such structure is called vertical integration, or economic giantism, is irrelevant so long as the individual farmer is the only beneficiary of the scheme.

"Nothing expressed or implied in the legislation under study leads us to believe that while the legislature intended to permit a farmer to do business through a tax-exempt cooperative it did not intend to permit him to pyramid his organization for greater efficiency and greater savings. The objective behind the legislation was to confer a benefit upon farmers. The commission has pointed to no legislative or judicial pronouncement in support of its theory that a method of doing business which is tax exempt at one level should be taxable at the next level of organization."

UNIFORM GRAIN STORAGE AGREEMENT -

OBLIGATION TO SUE AND COLLECT ON INSURANCE COVERAGE

(Bartlett and Company, Grain, v. Commodity Credit Corporation, USDC WD Mo.- Memorandum # 12240)

In this case the Court granted the Government's motion for Summary Judgment on its counterclaim and held that where money was received by plaintiff from its insurers for loss and damage to grain stored in its warehouse as the result of an explosion, the insurance coverage obtained insured to the benefit of the warehouse receipt holders and that the warehouseman was under an obligation to sue and collect at its own expense any indemnity due for loss or damage to stored grain and to pay the full indemnity collected on such grain to the warehouse receipt holders.

Plaintiff contended that Commodity Credit Corporation, an agency and instrumentality of the United States of America (15 U.S.C.A. 714) was entitled to no more than \$179,351.47, as its pro rata share of the proceeds of insurance, collected through a judgment obtained by plaintiff, in its former name. In that case plaintiff premised a claim against a number of insurance companies on three certificates of insurance issued to plaintiff as the operator of the River-Rail Elevator, located in Kansas City, Kansas, affording coverage for loss of grain stored therein, and also loss due to interruption of business. Of the total amount of the judgment as finally entered, \$308,846.77 plus \$61,169.33 interest, represented a recovery by plaintiff for loss of grain partially owned by it and by holders of "Terminal Public Warehouse Receipts" issued by plaintiff in respect to grain stored in River-Rail Elevator; which plaintiff operated under license from the State of Kansas.

Concededly, defendant's share of the grain loss supra, amounted to \$258,403.52. In respect to that loss, plaintiff, after "collecting" the amount of the above judgment, tendered a check to defendant for \$179,351.41, on the theory that such amount constituted defendant's share of the total loss of grain, less a proportion of the attorney's fees and other expenses incurred by plaintiff in the prosecution of the above-mentioned litigation. Hence the issues in the present action revolve around the question, whether defendant is to be charged with any portion of the total litigation expense and attorney's fees incurred by plaintiff in the prosecution of the above-referred-to action; or, whether defendant is entitled to

the sum of \$251,049.04, concededly recovered by plaintiff from insurance which offered coverage for the market value of defendant's grain loss, with interest thereon from March 6, 1957, the date such loss was "collected" by plaintiff.

When plaintiff's elevator located in Kansas City, Kansas, was flooded in 1951, much of plaintiff's own grain, as well as that of defendant, and that belonging to others holding Terminal Public Warehouse Receipts, issued by plaintiff, was destroyed. After such destruction, plaintiff was doubtful whether insurance policies obtained by it provided coverage for any such loss. However, it appeared to plaintiff, and its attorneys, that the proximate cause of the damage sustained to the grain in question, or to a large portion thereof, might have been due to the imbibation of some grain by flood waters, resulting in pressure which caused a number of explosions to occur in the elevator, releasing undamaged grain into the flood waters as a consequence of the "explosions". Accordingly, proofs of loss were presented to the insurance companies and when no adjustment was forthcoming suit was filed by the plaintiff. The case was fought vigorously, on both sides, through courts of the State of Missouri and up to a denial of certiorari by the Supreme Court of the United States, on March 6, 1957.

Commodity was at all times aware of such litigation. During the pendency thereof, Commodity received a letter from plaintiff, suggesting that it either pay its share of the litigation expense, or else waive its right to share in whatever proceeds might result from the suit. However, plaintiff did not hear from Commodity until after the Supreme Court denied certiorari, making plaintiff's victory in that litigation final. At that time, Commodity took the position, and maintains the same by its counterclaim herein, that it is, and was, entitled to receive a proportionate share of the insurance recovery obtained by plaintiff for grain loss, equal to the market value of its grain, which value determined a part of the total recovery made by plaintiff for loss of grain in such action; and this without any obligation on the part of Commodity to pay any part of the total cost of litigation incurred by plaintiff in connection therewith.

Plaintiff's contention is that when a person expends labor and effort in the creation of a fund which inures to the benefit of himself and others, such others are obligated to bear their fair share of the expense of creating the fund as a condition of sharing in the proceeds; as laid down in Trustee v. Greenough, 105 U.S. 527; Wallace v. Fiske, 80 F. 2d 897.

Shredded of all superfluity and simply stated, the issue boils down to whether plaintiff had a legal obligation, by the Uniform

Storage Agreement here considered, to bring suit to collect such insurance and pay to holders of certificates issued by plaintiff, the money so collected. By paragraph 15 of the Uniform Storage Agreement (Exhibit 3) entered into between plaintiff and defendant on July 1, 1950; as well as Section 34-236, G.S. Kan. 1949, certain obligations were imposed on plaintiff, as a Public Grain Warehouseman. Paragraph 15 of the Uniform Storage Agreement, supra, provides in part as follows:

"15. INSURANCE - Without in any way limiting his obligation under the other provisions of this agreement, the warehouseman shall insure and at all times keep insured, in his own name, all the grain for the full market value thereof (rather than the support price), against loss or damage by fire, lightning, inherent explosion, windstorm, cyclone, or tornado, and, in the event of any loss or damage to the grain, or to the warehouse, whether or not such loss was insured against, he shall immediately notify Commodity and the holders of the warehouse receipts and the certificates provided for in section 9 (b) representing such grain, as the holders appear on the records of the warehouseman, and he shall at his own expense promptly take the steps necessary to collect any moneys which may be due as indemnity for such loss or damage, including the bringing of suit, and, as soon as collected, shall pay to the holders of such warehouse receipts and certificates such moneys as may be collected for the loss or damage. . . ."

Section 34-236, G. S. Kan., 1949, required plaintiff to insure the grain in its elevators "for its full market value against loss by internal explosion. . . ." and the same statute gave to the holders of warehouse receipts issued by plaintiff on grain stored in its elevators "a first lien, to the extent of the value of grain at the time of destruction at the place where stored, on all such insurance for loss or injury sustained by them on account of the destruction or injury of such grain by internal explosion, or any other cause covered by such insurance policy." (Cf.) Farnay v. Hauswer, 109 Kan. 75, 198 Pac. 178 (1921); Miller's National Insurance Company v. Bunds, 158 Kan. 662, 149 P. (2d) 350, 354 (1944).

The Court ruled that under Section 15, supra, and the mandate of the Kansas Statute, supra, there was an expression of

intention on the part of the parties to the Uniform Storage Agreement, that plaintiff had a legal duty to bring suit on the insurance certificates in question, collect the proceeds thereof, pay the amount thereof to certificate holders, and to stand the expense of so doing.

The Court rejected the plaintiff's contention that when it commenced suit, its obligation was fulfilled and that the contract being silent about its responsibility for prosecuting the suit, general principles of law rather than any contract language should be applied. The decision stated that the "Uniform Warehouse Agreement" unequivocally placed the obligation on plaintiff to "collect" insurance as to which Commodity had a statutory lien.

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DISCRIMINATORY PRICES -

SECTION 4 OF THE ROBINSON-PATMAN ACT

(American Motor Specialties Co. v. Federal Trade Commission
278 F. 2d 225 - (May 5, 1960))

Proceeding by petitioners to set aside Federal Trade Commission order requiring them to cease and desist from asserted continued violation of the Clayton Act as amended by the Robinson-Patman Act. The Court of Appeals affirmed the order and held that where buyers of automobile parts knew that they as individual firms were receiving goods in the same quantities and were served by sellers in the same manner as their competitors and hence organized themselves into a buying group in order to obtain lower prices than their unorganized competitors, by very facts of having combined into a group and having thereby obtained favorable price differential, they were charged with notice that price differential could not be justified, and such notice was imputable to the group of which they were all members. The Court ruled that their actions were violative of statute prohibiting discrimination in price, irrespective of whether buying group's effort to bargain with various manufacturers constituted an improper inducement to price discrimination within the meaning of statute.

It was noted that in a series of cases this Court and three other courts of appeals sustained the Federal Trade Commission's findings that the price system of volume discounts by various manufacturers of automobile replacement parts had been violative of Section 2(a). In this case it was the conduct of the buyers from those manufacturers that was attacked. The Commission informed the Court that as of September 24, 1959, cease and desist orders had been entered against six other groups of buyers similar to petitioners.

Petitioners sought review of the cease and desist order issued by the Commission on March 12, 1959, charging them with violation of Section 2(f) of the amended Clayton Act, 15 U.S.C. § 13(f), a section making it unlawful for buyers knowingly to induce or receive prices violative of Section 2.

According to the Court's decision, petitioners knew that they, as individual firms, were receiving goods in the same quantities and were served by sellers in the same manner as their competitors, and hence organized themselves into a buying group in order to obtain lower prices than their unorganized competitors. Thus, irrespective of whether the buying group's efforts to bargain with the manufacturers constituted an improper inducement under Section 2(f), the Court held that the Commission introduced sufficient evidence to fulfill the requirements of Automatic Canteen v. F.T.C., 1953, 236 U.S. 61, 73 S. Ct. 1017, 97 L. Ed. 1454, when it showed that petitioners knowingly received preferential price treatment of such a nature as to violate Section 2.

One of petitioners' contentions was that the successor corporate buying group was organized under the Cooperative Corporations Law of the State of New York and, therefore, it was entitled to the protection of Section 4 of the Robinson-Patman Act which states that nothing in the Act shall prevent a cooperative association from returning to its members, producers, or consumers any part of the association's earnings.

The Court rejected this contention stating that Section 4 does not confer upon cooperative associations any blanket exemption from the Robinson-Patman Act and that it only protects a cooperative association from charges of violating the Act premised upon the association's method of distributing earnings. It concluded that the fact that earnings which resulted from illegal activity might have been distributed to the association's members did not insulate the association from prosecution for illegal activity and

that Section 4 does not permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members. (See Legal Series No. 13, p. 34, June 1960.)

The Commission's order was affirmed.

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COOPERATIVE ASSOCIATION EXEMPTION UNDER SECTION 203(b)(5)

INTERSTATE COMMERCE ACT PRECLUDES GRANTING OF

"GRANDFATHER" RIGHT UNDER SECTION 7(c) OF THE

TRANSPORTATION ACT OF 1958.

(Umatilla Canning Company Common Carrier "Grandfather"
Application - Docket No. MC 118424)

By application filed December 10, 1958, under the "Grandfather" provisions of Section 7(c) of the Transportation Act of 1958, Umatilla Canning Company of Milton-Freewater, Oregon, sought a certificate of public convenience and necessity authorizing the continuance of operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, in straight and mixed loads with certain exempt commodities, between points in Washington, Oregon, Minnesota, Idaho, Wisconsin, California, Colorado, Iowa, Missouri, Montana, Nebraska, Nevada, Oklahoma, Utah and South Dakota.

The report recommended by the I.C.C. examiner held that the applicant was a "cooperative association as defined in the Agricultural Marketing Act" within the meaning of section 203(b)(5) of the Interstate Commerce Act and that a certificate authorizing the operations described in the application was not required by, and could not properly be issued under, the Act. The order recommended was that the application be dismissed.

Notice to the parties served November 4, 1960, advised that exceptions had to be filed within 35 days and that at the expiration of the period the order would become effective unless exceptions were filed seasonably or the order was stayed or postponed by the Commission.

Applicant's position was that it was a cooperative association and hence within the provisions of section 203(b)(5) but that it was nevertheless entitled to a certificate or permit in accordance with section 7(c) of the Transportation Act of 1958. The examiner disagreed with the latter contention. He pointed out that section 203(b)(5) contains no provision, express or implied, for waiver by one coming within its terms.

The examiner determined first that the applicant was a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, and thus within the partial exemption of section 203(b)(5) of the Interstate Commerce Act, which provides in part that:

"Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined; * * *."

The definition of "cooperative association" appears in the Agricultural Marketing Act (12 U.S.C. 1141-1141j). Section 1141j(a) states:

"As used in this subchapter the term 'cooperative association' means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services: Provided, however, That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers, in an amount greater in value than the total amount of such business transacted by it with or for members. * * * . "

The recommended report stated that whether a party is a co-operative association as defined in the Agricultural Marketing Act required a construction of the latter Act which is a remedial statute and entitled to liberal construction to effectuate the purpose for which it was adopted, citing Interstate Commerce Com. v. Jamestown Farm U. F. Co-op, T.A., 151 f. 2d 403. (See Summary No. 25, p. 20, 3/1945, and Summary No. 28, p. 9, 12/1945).

Applicant's members were all farmers. It was organized under the laws of Oregon relating to farmers' cooperative associations. Pertinent provisions of the articles of association provided, among other things, that the association "may process, market, and distribute the agricultural produce and purchase supplies and equipment for non-members in an amount the value of which does not exceed the value of agricultural produce processed and marketed, distributed for or supplies purchased for members of the association." Additionally, it was provided that "dividends may be paid on common stock, but shall not exceed eight per cent (8%) per annum, and one vote per member, only."

The applicant operated a freezing plant which produced about 12 million pounds of frozen fruits and vegetables a year, and a canning plant which produced about 500,000 pounds of canned peas a year. Although it produced several other fruits and vegetables in smaller quantities, applicant's principal commodity was peas which were processed both for the frozen and canning markets. In 1959 applicant and five other farmer cooperatives organized American National Processors, Inc., hereinafter called the Association, for the purpose of marketing the frozen fruits and vegetables produced by its members. The Association marketed the entire frozen food production of all its members except one, and handled all billing and collecting and payment of transportation charges. Title to the

merchandise remained in the individual processor or shipper until delivery to consignee. Although for-hire motor and rail carriers were utilized to an undisclosed extent by the Association, applicant performed a substantial portion of the transportation. Applicant and the Association operated a joint traffic department, with all truck drivers being employed by the former. Applicant's transportation charges initially were set on a cost basis, the intention being that the operation should merely be self-supporting. It appeared, however, that since the initial hearing in the Commission proceeding in July 1959 certain adjustments had been made to provide for a profit-making operation, although the applicant stated that its transportation service was primarily for the development of the sales program of the members of the Association, there being no active solicitation of shipments from outside organizations. In addition to frozen foods, applicant also transported its own canned goods. Although during June 1959 approximately 32 percent of the total volume of frozen foods transported by applicant involved its own products, this fluctuated greatly, ranging to as much as 70 percent in other months.

In concluding that the application should be dismissed the examiner stated as follows:

"Congress' declaration of policy in the Agricultural Marketing Act shows a clear intent to confer broad powers upon cooperatives in the interest of promoting 'the effective merchandising of agricultural commodities in interstate and foreign commerce so that the industry of agriculture will be placed on a basis of economic equality with other industries'. Its definition of 'cooperative association', as hereinbefore stated, requires that the members thereof 'act together in processing, preparing for market, handling and/or marketing the farm products of persons so engaged' and 'purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services'. Applicant clearly comes within the foregoing definition insofar as the various activities related therein are concerned. The only question remaining is whether it meets the additional requirement 'that the association shall not deal in farm products, farm supplies, and farm business services with or for non-members in an amount greater in value than the total amount of such business transacted by it with or for members'. Although it is not possible to determine conclusively from this record whether applicant technically or literally meets the latter requirement, as previously noted, its articles of association limit its activities to the same extent and there is evidence indicating probable compliance.

Applicant's concern that sometime in the future it may lose its exemption under section 203(b)(5) by reason of its failure to maintain a 'cooperative' status within the meaning of the Agricultural Marketing Act might be well founded; however, such possibility is no justification for granting authority herein. It is noted, in passing, that the facts herein indicate fairly conclusively that the Association could qualify under the foregoing exemption should it decide to undertake the transportation operations now conducted by applicant." (Emphasis added.)

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SIDE AGREEMENT -

MEETING OF THE MINDS - MISREPRESENTATIONS

(Pacific Supply Cooperative v. United Farmers Cooperative, Inc. 354 P. 2d 718 (August 1960))

Creditor's action against debtor with which it had entered into agreements whereby, to enable debtor to obtain credit from Small Business Administration, indebtedness due creditor was subordinated and creditor received second mortgage on assets of debtor, and agreed to forbear collection of indebtedness for a five-year period. The creditor asserted that as a part of consideration for such agreements, debtor had entered into a side agreement with it whereby it would give exclusive patronage to creditor during such period or that estoppel created such a contract, and that debtor fraudulently breached such agreement. The Supreme Court, affirming judgment for defendant held that the trial court's findings that there had never been a meeting of minds for such agreement, that there had been no fraudulent misrepresentations, no promissory fraud, fraudulent concealment or estoppel were supported by evidence.

The plaintiff, Pacific Supply Cooperative, hereinafter called "Pacific" is a wholesale nonprofit farmers' cooperative association which supplied gasoline and other petroleum products to the defendant, United Farmers' Cooperative, Inc., hereinafter called "United";

a nonprofit farmers' cooperative corporation engaged in the business of acquiring, for its individual patrons, certain supplies and services at cost. It operated a service station at Toppenish.

The evidence revealed that on December 21, 1956, United was indebted to Pacific in the amount of \$61,073, of which only \$15,000 was secured by a mortgage on the assets of United. At that time new capital in the amount of \$35,000 became available to United through the Small Business Administration (hereinafter referred to as SBA) provided Pacific would subordinate its indebtedness to that of SBA and make no effort at collection for a five-year period. This additional capital was essential if United was to continue operations. Pacific agreed to accept a second mortgage on the assets of United for the amount of its indebtedness, subject to SBA's first mortgage. Pacific also agreed to execute a "standby agreement" which would, for a five-year period, preclude it from collecting the indebtedness due it or from foreclosing its second mortgage. Pacific also agreed that no interest would be charged on the indebtedness during the 5-year standby period, and also made other concessions.

On January 22, 1957, Pacific and United executed and delivered to SBA the subordination and five-year-standby agreements; SBA advanced \$35,000 and took first mortgage on United's assets for that amount.

The gist of the case was whether, as part of the consideration for the subordination and standby agreements and other concessions by Pacific, United agreed to enter into a side agreement whereby it would give its exclusive patronage to Pacific during the standby period of five years; or whether, if there was no specific promise to enter into an exclusive patronage agreement - to quote appellant's statement in its brief - " * * * estoppel will create an enforceable contract to avoid injustice due (a) to acceptance by United of benefits; and (b) by reason of its deliberate silence when there was duty to speak, when it knew * * * that Pacific was relying on such an exclusive patronage agreement."

Pacific contended that United agreed to such an "exclusive patronage" agreement at a meeting of the representatives of both organizations on December 21, 1956. The trial court found at that meeting United's then Manager stated specifically that " * * * United was not willing to execute any exclusive patronage contract other than its Membership Agreement with Pacific, because the Membership Agreement already in effect was sufficient * * *."

The Court noted that there was a clear distinction between the exclusive patronage agreement referred to throughout this

opinion, which Pacific claims was part of the consideration for its subordination and standby agreements, and the exclusive patronage provision which was part of United's membership agreement with Pacific, which agreement could be terminated at any time on 60-day's notice, by either party. The exclusive patronage agreement with which the Court was concerned in this opinion, could not be terminated during the five-year period of the standby agreement. When the exclusive patronage provision in the membership agreement was violated by United's withdrawing and ceasing patronage of Pacific, Pacific exercised its rights and secure the liquidated damage to which it was entitled. Alleging breach of the claimed exclusive patronage agreement, Pacific began action. When the case went to trial, it was agreed, in effect, that if Pacific established that it was entitled to the benefits of such an exclusive patronage agreement, then the standby agreement was no longer binding, and Pacific (fully protecting SBA) was entitled to foreclose its second mortgage securing all of United's indebtedness to Pacific. As the trial court put it, in its memorandum decision, " * * * The primary issue is very important one of timing - may Pacific foreclose its mortgage now, or must it wait five years without interest until the expiration of the standby period?"

The trial court found that there had never been a meeting of minds between Pacific and United for an exclusive patronage agreement; that there had been no fraudulent misrepresentations, no promissory fraud, no fraudulent concealment, no estoppel either by representation or by silence, and no unjust enrichment. All of the issues inherent in the findings were thoroughly examined and the Supreme Court affirmed the trial court's judgment of dismissal.

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INJUNCTION - PUBLIC UTILITY

(Tampa Electric Company v. Withlacoochee River Electric Cooperative, Inc. Fla. 122 So.2d 471 (June 1960))

In this case the Supreme Court held that an electric company which had the status of a public utility and which held a non-exclusive franchise to distribute electricity in the area had sufficient standing to bring suit to enjoin a rural electric cooperative from furnishing electric energy to customers previously being adequately served by electric company. Orders of District Court of Appeal quashed, with directions.

This litigation involved two consolidated petitions for writs of certiorari on the alleged ground that the District Court's decisions were in direct conflict with the Supreme Court's decision in the case of St. Joseph Tel & Tel Co. v. Southeastern Tel Co., 1941, 149 Fla. 14, So. 2d 55. The District Court of Appeals reversed action of the Circuit Court which had granted a temporary restraining order enjoining Withlacoochee from furnishing electric energy to certain persons in a "rural area."

Tampa Electric Company was engaged in the business of manufacturing, distributing and selling electric energy. It is a public utility company in the State of Florida within the definition of Chapter 366, Florida Statutes, F.S.A., and holds a non-exclusive franchise to do business in the territory involved in this case. The Withlacoochee River Electric Cooperative, Inc., is engaged in the same business as the Tampa Electric Company but is organized and exists under Chapter 425, Florida Statutes, F.S.A., which is an incorporation statute for cooperative, non-profit membership corporations, desiring to be organized thereunder, for the purpose of supplying electric energy in rural areas.

Section 425.04 authorized such a cooperative to sell electric energy in rural areas " * * * provided, however, that no cooperative shall distribute or sell any electricity or electric energy to any person residing within any town, city or area which person is receiving adequate central station service or who at the time of commencing such service, or offer to serve, by a cooperative is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation." Being an electric utility cooperative Withlacoochee was not subject to the provisions of Chapter 366.

The District Court of Appeals opinion reflects the following pertinent facts:

"In the instant case Withlacoochee was restrained from supplying service to a corporation. The basis for the chancellor's findings was that the corporation is but the alter ego of a partnership, on adjoining land, which Tampa Electric was at the time serving. Ordinarily, such a suit could not be brought by the Tampa Electric, but would have to be brought by the state itself. In their complaint Tampa Electric alleged that unless the restraining order was so entered, it would take away from Tampa Electric certain valuable property rights by virtue of depriving Tampa Electric of the revenue which it would receive from the services to be rendered in the future and that Tampa Electric would be irreparably

injured thereby. So, in deciding the right of Tampa Electric to bring this suit we must necessarily take into account the allegations of the complaint, which we have just paraphrased."

Referring to the foregoing, the majority of the District Court reversed the chancellor's order on the principal ground that under this court's decision in the St. Joseph case, supra, Tampa Electric does not have sufficient standing in a court of equity to bring the instant suits.

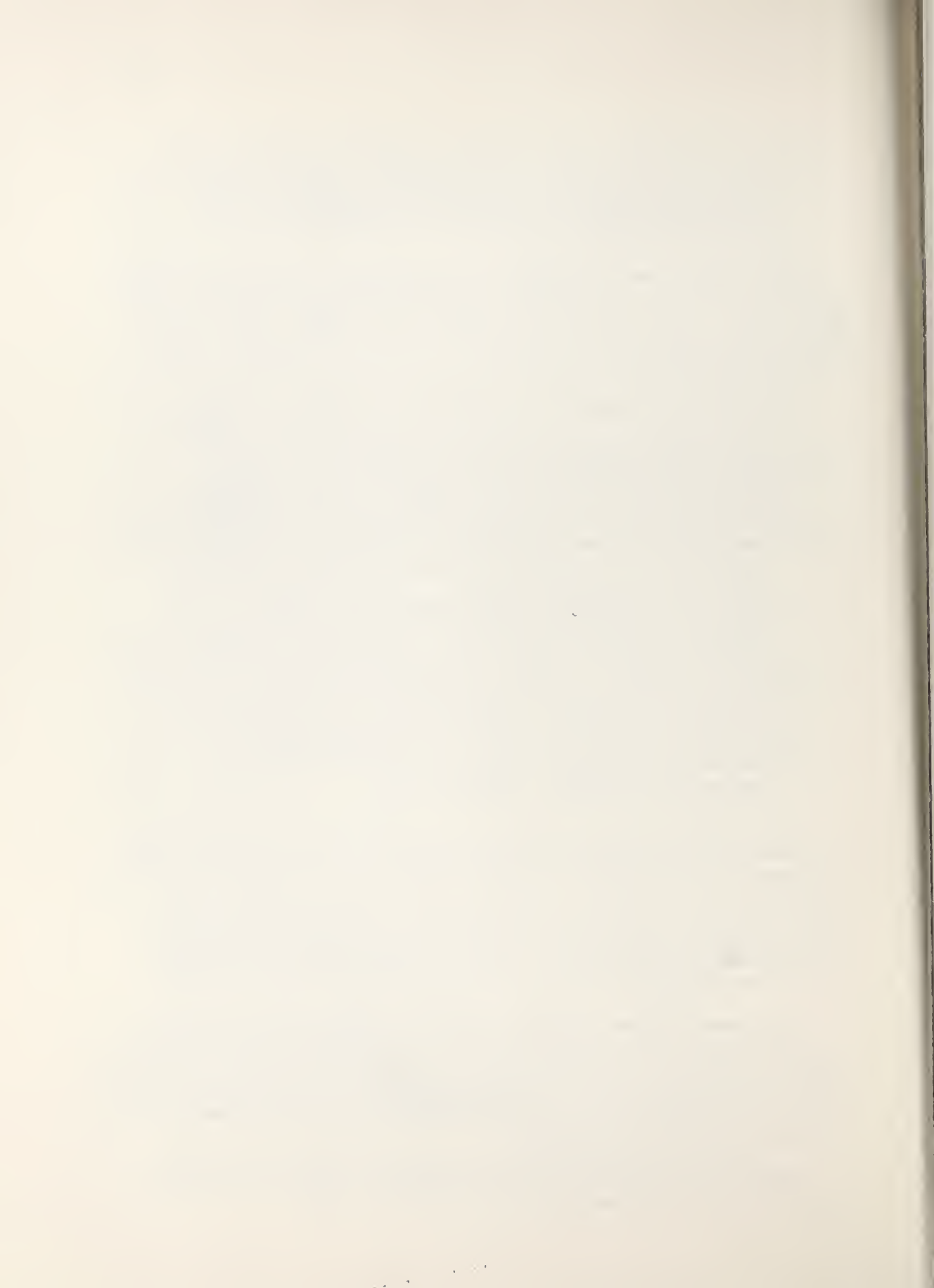
The following excerpt is from the St. Joseph case, supra:

"While the validity and scope of the corporate franchise rights conferred upon a public utility company may not be tested in a suit brought by a private party or corporation, yet when property of a public utility corporation is trespassed upon or is unlawfully injured or endangered, or the public utility corporation is unlawfully and materially hindered in the performance of its duty in rendering its authorized public service, by a potential competitor or others, the law provides for obtaining relief or redress at the suit of the injured party; and when the nature of the case warrants it under the law, and the facts are properly and sufficiently presented, appropriate judicial relief by injunction may be granted as provided by law and the principles of equity, without adjudicating the corporate franchise rights of a defendant corporation."

The Supreme Court of Florida concluded that the complaint in this case sufficiently alleged that the cooperative in these cases had used its preferential economic advantage as a means of extending its service to customers previously being adequately served by Tampa Electric. Such activity exceeded not only the fundamental underlying purpose which motivated the establishment of the rural electrification program, but also it violated the plain language as well as the spirit of Section 425.04, F.S.A.

The Supreme Court also held that the cooperative's activities were tantamount to an unlawful injury or hindrance of Tampa Electric's property rights and that the opinion of the District Court of Appeals was in direct conflict with the St. Joseph case in that said court followed the general rule of that case whereas it should have followed the exception set forth therein.

Orders of the District Court of Appeals quashed and remanded cases for further proceedings in the Circuit Court.



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